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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 9, 22, and 52

[FAC 2005-87; FAR Case 2013-020; Item I; Docket 2013-0020, Sequence 1]

RIN 9000-AM74

Federal Acquisition Regulation; Information on Corporate Contractor Performance and Integrity

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 to include in the Federal Awardee Performance and Integrity Information System (FAPIIS), to the extent practicable, identification of any immediate owner or subsidiary, and all predecessors of an offeror that held a Federal contract or grant within the last three years. The objective is to provide a more comprehensive understanding of the performance and integrity of the corporation before awarding a Federal contract.

DATES: EFFECTIVE: [Insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia Davis, Procurement Analyst, at 202-219-0202, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-87, FAR Case 2013-020.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 79 FR 71975 on December 4, 2014. The comment period closed on February 2, 2015. Two respondents submitted comments on the proposed rule.

The final rule implements section 852 of the NDAA for FY 2013 (Pub. L. 112-239) with regard to Federal contracts. Section 852 requires that the FAPIIS include, to the extent practicable, information on any parent, subsidiary, or successor entities to a corporation in a manner designed to give the acquisition officials using the database a comprehensive understanding of the performance and integrity of the corporation in carrying out Federal contracts and grants. This final rule addresses the collection of information with regard to offerors that are

responding to a solicitation for a Federal contract. The data on the immediate owner and direct subsidiaries of an entity will be available through FAPIIS, based on the data obtained from offerors in response to the FAR provision 52.204-17, Ownership or Control of Offeror, which was published in the Federal Register at 79 FR 31187 on May 30, 2014, as a final rule under FAR Case 2012-024.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes

There were no changes made in the final rule in response to the public comments received.

B. Analysis of public comments

Comment: One respondent commented that it would be helpful if the relevant FAR provisions and FAR clause 52.204-20 clarified whether the three year "lookback" period starts on the effective date of when the predecessor merged or was acquired by the successor or the date the contracts of the predecessor were novated from the predecessor to the successor.

Response: The "lookback" period starts on the date the offeror signs the representation. If, within the three years prior to signing the representation, there was a merger or acquisition, it shall be reported. The date of novation is not relevant for purposes of this rule.

Comment: One respondent supported the statute because it requires that information be provided to the contracting officers to aid in making responsibility determinations, and supported the position that the "further the distance between entities, the less relevant the information is likely to be for establishing responsibility of the offeror."

Response: Noted.

Comment: One respondent commented that the proposed rule's requirement to report data on all predecessors of the offeror that received a Federal contract or grant within the last three years would apply an undue burden on prospective contractors and not achieve the Government's stated objective of providing a more comprehensive understanding of a potential contractor's performance and integrity. The respondent proposed that publicly traded companies subject to Securities and Exchange Commission requirements be exempt from this requirement because it instills a burden without benefit to the Government.

Response: The statute does not allow for this exemption.

Comment: One respondent commented that large multi-national organizations many times reorganize business units in order to effectively respond to changing needs of the marketplace. These reorganizations can include alternate legal structures. The assets of one legal entity may pass through three or four more before landing at the new entity. The respondent proposed that where the ultimate owner remains the same before and after a transaction, the contractor be exempted from providing information on predecessor entities. According to the respondent, this is consistent with the Government's exclusion of a "new offices/divisions of the same company" from the definition of "successor".

Response: This recommendation does not meet the requirements of the statute.

Comment: One respondent commented that contracting officers and their counsel perform a rigorous review and analysis to deal with the novation process and feels that there should be no requirement to identify prior owners within the FAPIIS because the required responsibility determination would have been conducted through novation.

Response: The statute requires collection of information on predecessor, regardless of any novation action by the Government.

Comment: The respondent commented that the reporting of the ultimate owners became effective on November 1, 2014, and believe that agencies should allow contractors and contracting officers time to implement and evaluate the results of this new requirement before adding more requirements that may not aid contracting officers in responsibility and integrity evaluations.

Response: The statute does not allow the Government to delay the implementation of this Act.

Comment: The respondent feels that commercially available off-the-shelf (COTS) items should be excluded from this requirement.

Response: The Administrator of the Office of Federal Procurement Policy has determined that this rule applies to COTS items.

C. Applicability

Based on determinations by the FAR signatories (DoD, GSA, and NASA) and the Administrator for Federal Procurement Policy, in accordance with 41 U.S.C. 1905, 1906, and 1907, this rule applies to all solicitations and resultant contracts, including contracts and subcontracts

for acquisitions in amounts not greater than the simplified acquisition threshold, and contracts and subcontracts for the acquisition of commercial items, (including commercially available off-the-shelf items). Because the emphasis of section 852 of the NDAA for FY 2013 (Pub. L. 112-239) is to provide acquisition officials using FAPIIS with a comprehensive understanding of the performance and integrity of the corporation in carrying out Federal contracts, it is not in the best interest of the Federal Government to waive the applicability of section 852 to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, or for the acquisition of commercial items (including COTS items).

III. Executive Order 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not

subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the burden is minimal to provide the CAGE Code and the name of all predecessors that held a Federal contract or grant within the last three years. However, a Final Regulatory Flexibility Analysis has been performed and is summarized as follows:

This case implements section 852 of the NDAA for FY 2013 (Pub. L. 112-239). The objective of this rule is to provide acquisition officials using the Federal Awardee Performance and Integrity Information System (FAPIIS) a comprehensive understanding of the performance and integrity of the corporation in carrying out Federal contracts. The legal basis for the rule is section 852 of the NDAA for FY 2013 (Pub. L. 112-239).

No comments were received from the public relative to the initial regulatory flexibility analysis.

It is not expected that this rule will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the burden is minimal to provide the CAGE Code and the name of all predecessors that held a Federal contract or grant within the last three years.

The data on immediate owner and direct subsidiaries of an entity will be available through FAPIIS, based on the data obtained from offerors in

response to the FAR provision 52.204-17, Ownership or Control of Offeror, that requires this information for the CAGE code. The Federal Government received offers from approximately 413,800 unique vendors in FY 2011. Approximately 275,900 of these offers were from unique small businesses, which will be required to respond to the proposed provision.

The rule requires approximately one submission per year, with an estimated average of .1 preparation hours per response. The response time will be less for most respondents, who will only be required to check a box. Only those respondents that check "is" will have to provide a minimal amount of information (CAGE Code and legal name of all predecessors that held a Federal contract or grant within the last three years). A mid-level professional skill would be required in some instances to know whether the entity is a successor, as defined in the rule.

There are no exemptions from the rule for small entities, because the law does not provide for any such exemption. However, the final rule limits the review of predecessor entities to three years, and only requires information relating to the most recent predecessor, if any.

DoD, GSA and NASA did not identify any significant alternatives that would reduce impact on small business and still accomplish the objectives of the statute and the policies.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The rule contains information collection requirements. The Office of Management and Budget (OMB) has cleared this information collection requirement under

OMB Control Number 9000-0189, titled: Identification of
Predecessors.

List of Subjects in 48 CFR Parts 1, 4, 9, 22, and 52

Government procurement.

Dated: February 29, 2016.

William Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 4, 9, 22, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 4, 9, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106, in the table following the introductory text, by adding in numerical sequence, FAR segment "52.204-20" and its corresponding OMB Control No. "9000-0189".

PART 4—ADMINISTRATIVE MATTERS

3. Amend section 4.1202 by redesignating paragraphs (a)(6) through (30) as paragraphs (a)(7) through (31), respectively, and adding paragraph (a)(6) to read as follows.

4.1202 Solicitation provision and contract clause.

(a) * * *

(6) 52.204-20, Predecessor of Offeror.

* * * * *

4. Amend section 4.1804 by adding paragraph (d) to read as follows:

4.1804 Solicitation provisions and contract clause.

* * * * *

(d) Insert the provision at 52.204-20, Predecessor of Offeror, in all solicitations that include the provision at 52.204-16, Commercial and Government Entity Code Reporting.

PART 9—CONTRACTOR QUALIFICATIONS

5. Amend section 9.104-6 by revising paragraphs (a) and (b) to read as follows:

9.104-6 Federal Awardee Performance and Integrity

Information System.

(a) (1) Before awarding a contract in excess of the simplified acquisition threshold, the contracting officer shall review the performance and integrity information available in the Federal Awardee Performance and Integrity Information System (FAPIIS), (available at www.ppirs.gov, then select FAPIIS), including FAPIIS information from the System for Award Management (SAM) Exclusions and the Past Performance Information Retrieval System (PPIRS).

(2) In accordance with 41 U.S.C. 2313(d) (3), FAPIIS also identifies—

(i) An affiliate that is an immediate owner or subsidiary of the offeror, if any (see 52.204-17, Ownership or Control of Offeror); and

(ii) All predecessors of the offeror that held a Federal contract or grant within the last three years (see 52.204-20, Predecessor of Offeror).

(b)(1) When making a responsibility determination, the contracting officer shall consider all the information available through FAPIIS with regard to the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror in FAPIIS, as well as other past performance information on the offeror (see subpart 42.15).

(2) For evaluation of information available through FAPIIS relating to an affiliate of the offeror, see 9.104-3(c).

(3) For source selection evaluations of past performance, see 15.305(a)(2). Contracting officers shall use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present acquisition.

(4) Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a five-year period, some of that information may not be relevant to a determination of present responsibility, e.g., a prior administrative action such as debarment or suspension that has expired or otherwise been resolved, or

information relating to contracts for completely different products or services.

(5) Because FAPIIS is a database that provides information about prime contractors, the contracting officer posts information required to be posted about a subcontractor, such as trafficking in persons violations, to the record of the prime contractor (see 42.1503(h)(1)(v)). The prime contractor has the opportunity to post in FAPIIS any mitigating factors. The contracting officer shall consider any mitigating factors posted in FAPIIS by the prime contractor, such as degree of compliance by the prime contractor with the terms of FAR clause 52.222-50.

* * * * *

6. Amend section 9.105-1 by revising the introductory text of paragraph (c) to read as follows:

9.105-1 Obtaining information.

* * * * *

(c) In making the determination of responsibility, the contracting officer shall consider information available through FAPIIS (see 9.104-6) with regard to the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror in FAPIIS, including information that is linked to FAPIIS such as from SAM, and

PPIRS, as well as any other relevant past performance information on the offeror (see 9.104-1(c) and subpart 42.15). In addition, the contracting officer should use the following sources of information to support such determinations:

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT

ACQUISITIONS

22.1006 [Amended]

7. Amend section 22.1006 by removing from paragraph (a) (2) (i) (C) "52.204-8(c) (2) (iii) or (iv)" and adding "52.204-8(c) (2)" in its place; removing from paragraph (e) (2) (i) "52.204-8(c) (2) (iii)" and adding "52.204-8(c) (2)" in its place; and removing from paragraph (e) (4) (i) "52.204-8(c) (2) (iv)" and adding "52.204-8(c) (2)" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Amend section 52.204-8 by—
- a. Revising the date of provision;
 - b. Redesignating paragraphs (c) (2) (ii) through (vii) as paragraphs (c) (2) (iii) through (viii), respectively; and
 - c. Adding paragraph (c) (2) (ii).

The revision and addition read as follows:

52.204-8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS ([INSERT ABBREVIATED MONTH
AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(c) * * *

(2) * * *

_____ (ii) 52.204-20, Predecessor of Offeror.

* * * * *

9. Add section 52.204-20 to read as follows:

52.204-20 Predecessor of Offeror.

As prescribed in 4.1804(d), insert the following provision:

PREDECESSOR OF OFFEROR ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS
AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

(a) Definitions. As used in this provision—

Commercial and Government Entity (CAGE) code means—

(1) An identifier assigned to entities located in the United States and its outlying areas by the Defense Logistics Agency (DLA) Contractor and Government Entity (CAGE) Branch to identify a commercial or government entity, or

(2) An identifier assigned by a member of the North Atlantic Treaty Organization (NATO) or by NATO's Support Agency (NSPA) to entities located outside the United States and its outlying areas that DLA Contractor and Government Entity (CAGE) Branch records and maintains in the CAGE master file. This type of code is known as an NCAGE code.

Predecessor means an entity that is replaced by a successor and includes any predecessors of the predecessor.

Successor means an entity that has replaced a predecessor by acquiring the assets and carrying out the

affairs of the predecessor under a new name (often through acquisition or merger). The term "successor" does not include new offices/divisions of the same company or a company that only changes its name. The extent of the responsibility of the successor for the liabilities of the predecessor may vary, depending on State law and specific circumstances.

(b) The Offeror represents that it ☐ is or ☐ is not a successor to a predecessor that held a Federal contract or grant within the last three years.

(c) If the Offeror has indicated "is" in paragraph (b) of this provision, enter the following information for all predecessors that held a Federal contract or grant within the last three years (if more than one predecessor, list in reverse chronological order):

Predecessor CAGE code: _____ (or mark "Unknown").

Predecessor legal name: _____.
(Do not use a "doing business as" name).

(End of provision)

10. Amend section 52.212-3 by-

- a. Revising the date of the provision;
- b. Removing from the introductory text of the provision "paragraphs (c) through (q)" and adding "paragraphs (c) through (r)" in its place;
- c. Adding to paragraph (a), in alphabetical order, the definitions "Predecessor" and "Successor";
- d. Removing from the first undesignated paragraph following paragraph (b)(2) "paragraphs (c) through (q)" and adding "paragraphs (c) through (r)" in its place; and
- e. Adding paragraph (r).

The revision and additions read as follows:

**52.212-3 Offeror Representations and Certifications—
Commercial Items.**

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERICAL ITEMS ([INSERT
ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN
THE FEDERAL REGISTER])

* * * * *

(a) * * *

Predecessor means an entity that is replaced by a
successor and includes any predecessors of the predecessor.

* * * * *

Successor means an entity that has replaced a
predecessor by acquiring the assets and carrying out the
affairs of the predecessor under a new name (often through
acquisition or merger). The term "successor" does not
include new offices/divisions of the same company or a
company that only changes its name. The extent of the
responsibility of the successor for the liabilities of the
predecessor may vary, depending on State law and specific
circumstances.

* * * * *

(r) Predecessor of Offeror. (Applies in all
solicitations that include the provision at 52.204-16,
Commercial and Government Entity Code Reporting.)

(1) The Offeror represents that it ☐ is or ☐ is not
a successor to a predecessor that held a Federal contract
or grant within the last three years.

(2) If the Offeror has indicated "is" in paragraph
(r)(1) of this provision, enter the following information
for all predecessors that held a Federal contract or grant
within the last three years (if more than one predecessor,
list in reverse chronological order):

Predecessor CAGE code: _____ (or mark "Unknown").

Predecessor legal name: _____.
(Do not use a "doing business as" name).

* * * * *

[BILLING CODE 6820-EP]

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